



Department of Defense INSTRUCTION

NUMBER 5400.04
March 17, 2009

ASD(LA)

SUBJECT: Provision of Information to Congress

References: See Enclosure 1

1. PURPOSE. This Instruction:

a. Reissues DoD Directive (DoDD) 5400.4 (Reference (a)) as a DoD Instruction in accordance with the authority in DoDD 5142.01 (Reference (b)).

b. Implements the policies and procedures of the Department's provision of information, both classified and unclassified, to the Congress, and assigns responsibilities for approving and coordinating responses to requests for information from the Congress.

2. APPLICABILITY AND SCOPE. This Instruction:

a. Applies to OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to collectively as the "DoD Components").

b. Does not cover the processing of legislation covered by the Office of Management and Budget (OMB) Circular A-19 (Reference (c)), DoDD 5118.03 (Reference (d)), DoDD 5145.1 (Reference (e)), or DoDD 5500.01 (Reference (f)), including matters relating to appropriations that fall under the cognizance of the Under Secretary of Defense (Comptroller)(USD(C)/Chief Financial Officer (CFO), Department of Defense (USD(C)/CFO).

c. Nothing in this Instruction should be construed as preventing the Inspector General of the Department of Defense from fulfilling his or her duties pursuant to the Inspector General Act of 1978, as amended, title 5, United States Code, Appendix (Reference (g)).

d. This Instruction does not apply to the coordination and provision of intelligence and intelligence-related information to Congress by DoD Components, to the extent that the

provision of such information is subject to other policies and procedures directed by the President or agreed upon among the Office of the Under Secretary of Defense for Intelligence, the OMB and the Office of the Director of National Intelligence.

3. DEFINITIONS. These terms and their definitions are for the purpose of this Instruction.

a. Budget Justification Books. Material prepared by the Department of Defense at the direction of and in the format prescribed by congressional committees to explain and justify in detail the estimates contained in DoD budgets.

b. Executive Session Testimony. Testimony taken in closed congressional hearings, transcripts of which may contain information requiring the protection of a security classification.

c. Inserts for the Record (IFRs). Amplifying and/or supplemental information prepared by the Department of Defense and intended for inclusion in the record of congressional hearings.

d. Prepared Statement. A statement, including supplemental material such as graphs or charts, prepared by a DoD witness for presentation to a congressional committee in open or executive session.

e. Questions for the Record (QFRs). Questions posed by a member of Congress to be answered by the Department of Defense for inclusion in the record of congressional hearings.

4. POLICY. It is essential to the proper functioning of the U.S. Government that the Congress receives adequate information concerning all Government programs and operations. To that end, it is DoD policy:


a. To make information concerning its operations and activities available to members of Congress and congressional committees and their staffs.

b. That information not available to the public pursuant to DoD 5200.1-R (Reference (h)) will be made available to the Congress in accordance with Enclosure 3, paragraph 6, of this Instruction.

5. PROCEDURES. Procedures for Coordination, Security Review, and Clearance of Prepared Statements for the Congress; Responding to Congressional Requests, Inquiries, and Investigations; Processing Congressional Transcripts; and Processing IFRs and QFRs are contained in Enclosures 3 through 6, respectively.

6. RELEASABILITY. UNLIMITED. This Instruction is approved for public release and is available on the Internet from the DoD Issuances Web Site at <http://www.dtic.mil/whs/directives>.

7. EFFECTIVE DATE. This Instruction is effective immediately.



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Enclosures

1. References
2. Responsibilities
3. Procedures for Coordination, Security Review, and Clearance of Prepared Statements for the Congress
4. Responding to Congressional Requests, Inquiries, and Investigations
5. Processing Congressional Transcripts
6. Processing IFRs and QFRs

ENCLOSURE 1

REFERENCES

- (a) DoD Directive 5400.4, "Provision of Information to Congress," January 30, 1978 (hereby canceled)
- (b) DoD Directive 5142.01, "Assistant Secretary of Defense for Legislative Affairs (ASD(LA))," September 15, 2006
- (c) OMB Circular A-19, "Legislative Coordination and Clearance," Revised September 20, 1979
- (d) DoD Directive 5118.03, "Under Secretary of Defense (Comptroller) (USD(C))/Chief Financial Officer (CFO), Department of Defense," January 6, 1997
- (e) DoD Directive 5145.1, "General Counsel of the Department of Defense," May 2, 2001
- (f) DoD Directive 5500.01, "Preparing, Processing, and Coordinating Legislation, Executive Orders, Proclamations, Views Letters, and Testimony," June 15, 2007
- (g) Inspector General Act of 1978, as amended, title 5, United States Code, Appendix
- (h) DoD 5200.1-R "Information Security Program," January 14, 1997
- (i) DoD Instruction 5230.29, "Security and Policy Review of DoD Information for Public Release," January 8, 2009
- (j) Deputy Secretary of Defense Memorandum, "Congressional Testimony Coordination and Clearance Procedures," March 3, 2007¹
- (k) DoD Directive 5400.07, "DoD Freedom of Information Act (FOIA) Program," January 2, 2008
- (l) DoD 5110.4-M, "Manual for Written Material," March 2, 2004
- (m) DoD Directive 5122.05, "Assistant Secretary of Defense for Public Affairs (ASD(PA))," September 5, 2008

¹ Available at <http://www.dtic.mil/whs/esd/osr/docs/OSRTestimonyProcess.pdf>

ENCLOSURE 2

RESPONSIBILITIES

1. ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE AFFAIRS (ASD(LA)).

The ASD(LA) shall:

a. Coordinate and provide support for congressional publication of DoD's congressional hearing related materials with the exception of appropriations related hearing materials.

ASD(LA) is the central point for receipt of authorization hearing related materials and shall coordinate these materials within the Department and transmit as necessary to the Congress.

b. Oversee activities within the policies and procedures governing legislative investigations of DoD activities, including liaising with the Congress to coordinate DoD response. In this capacity, ASD(LA) shall inform appropriate DoD personnel of the status of such investigations (except for those affecting budgets and appropriations, and those related to financial matters).

2. USD(C)/CFO. The USD(C)/CFO shall:

a. Direct the formulation and presentation of Defense budgets and interact with the Congress on budgetary and fiscal matters, including legislative investigations on these matters.

b. Coordinate and provide support for congressional publication of DoD's appropriations related hearing materials. USD(C)/CFO is the central point for receipt of appropriations related hearing materials and shall coordinate these materials within the Department and transmit as necessary to the Congress.

3. GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE (GC, DoD). The GC, DoD, shall develop the DoD legislative program and coordinate DoD positions on legislation and Executive orders.

4. ASSISTANT SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS (ASD(PA)). The ASD(PA) shall review replies to congressional inquiries or requests or other transmittals that may result in the release of information with significant public affairs implications.

5. UNDER SECRETARY OF DEFENSE FOR INTELLIGENCE (USD(I)). The USD(I) shall coordinate DoD intelligence related hearing materials as necessary.

6. HEADS OF THE DoD COMPONENTS. The Heads of the DoD Components shall:

- a. Coordinate all draft testimony and statements with the ASD(LA); gain approval of the DoD Office of Security Review (OSR), in accordance with DoD Instruction 5230.29 (Reference (i)); and secure clearance from the OMB through the DoD Office of Legislative Counsel (OLC), under the GC, DoD, in accordance with Deputy Secretary of Defense Memorandum (Reference (j)). Unclassified draft testimony shall be e-mailed to the OLC at OLCTestimony@dodgc.osd.mil, no later than 3 days prior to the scheduled appearance before Congress.
- b. Edit their respective transcripts, IFRs, and QFRs according to deadlines established by the congressional committee that held the hearing.
- c. Make maximum information available promptly to, and cooperate fully with, members of Congress and congressional committees and their staffs.
- d. Answer constituents' letters to members of Congress as fully as possible, subject to the provisions of Enclosure 4 of this Instruction, the classification of official information in the interest of national defense pursuant to Reference (h), and the restrictions on official information pursuant to DoDD 5400.7 (Reference (k)).
- e. DoD Components shall furnish information copies of all direct written communications to and from the Congress, with respect to Congressional investigations, to the ASD(LA).

ENCLOSURE 3

PROCEDURES FOR COORDINATION, SECURITY REVIEW, AND CLEARANCE
OF PREPARED STATEMENTS FOR THE CONGRESS

1. PREPARED STATEMENTS

a. DoD personnel testifying as witnesses before congressional committees or handling requests from the Congress shall protect certain types of information from public disclosure pursuant to References (h) and (k).

b. If the testimony is to be submitted in writing, it should contain an overall classification to designate the security protection necessary pursuant to Reference (h).

c. If the testimony is to be given orally, the congressional committee concerned shall be advised, in advance, of the security classification and the requirement for protecting the sensitive portions from public disclosure.

d. Procedures established by congressional committees with respect to the preparation and delivery of prepared statements shall be complied with to the extent possible. When a written statement is used by a DoD witness, the statement shall be submitted to the committee 2 days in advance of the witness's appearance or per the rules of that committee.

2. SUBMISSION OF PREPARED STATEMENTS. Prepared statements shall be submitted electronically to the DoD OSR as far in advance of the required date of transmittal to a congressional committee as possible, 5 or more working days prior to transmission to the OLC. DD Form 1790, "Prepared Testimony Review," shall be used to forward statements to the DoD OSR for review and clearance. The form shall be signed by an official authorized by the Secretary of a Military Department or a Head of a DoD Component to certify that the information is unclassified and is consistent with DoD policy.

3. OMB COORDINATION. After completion of internal coordination and security review, and prior to release outside the Executive Branch, proposed DoD testimony by all DoD Components except for the Military Departments and the Office of the Inspector General of the Department of Defense shall be forwarded to the OLC no later than 3 days prior to a congressional hearing in accordance with Reference (j) for coordination with the OMB for clearance pursuant to Reference (c).

4. SCOPE OF THE CLEARANCE REQUIREMENT UNDER OMB CIRCULAR A-19. The routine advance clearance requirements of paragraph 7 of Reference (c) extend only to proposed DoD testimony that addresses pending legislation or contains specific legislative recommendations. In the absence of a specific OMB request for submission, clearance is not required for testimony:

- a. Furnished during oversight hearings that do not seek DoD positions on specific legislation; or
- b. Expressing official views on pending legislation in a manner that is identical to a formal DoD report on such legislation previously cleared by the OMB during the same Congress.

5. OMB COORDINATION AND CLEARANCE PROCEDURE

a. Copies of proposed written statements as cleared pursuant to Reference (j) will be transmitted to the OMB electronically, through the Director, OLC, with a short statement of the anticipated date and time of the hearing and a request for expeditious clearance. A copy of the transmittal email and the electronic copy of the proposed statement will simultaneously be furnished to OASD(LA).

b. The OLC will provide the OMB with a copy of the final testimony statement at the conclusion of coordination, incorporating all changes required for OMB clearance and as agreed to by the respective DoD Component.

6. SECURITY

a. Testimony concerning classified information requiring security protection shall be given only in closed session. Transcripts of such testimony may be released for publication only after they have been reviewed by the DoD OSR and approved for release by the chairman of the congressional committee that held the hearing.

b. All such transcripts shall be reviewed for security, proofread, and corrected by the witness prior to being forwarded to the DoD OSR.

c. Written statements prepared for formal presentation, budget justification books, and other material provided to congressional committees, which may be made a part of the published record of congressional hearings, also require review and clearance by the DoD OSR per Reference (j).

d. Supplementary, backup, and reference material provided to the committees, which will not be made a part of the published record, or which is prepared for use by witnesses in responding to members' questions, usually does not require review by the DoD OSR.

e. Pursuant to the provision of paragraph AP3.2 of Reference (h), the portions of material submitted for review which qualify for the marking "For Official Use Only" must be so designated and accompanied by an explanation of the rationale for the finding according to paragraph AP3.2.1.1 of Reference (h). Material designated "For Official Use Only" shall not be released to constituents or for public publication.

f. On request, DoD Components shall provide prompt and full guidance and assistance to the DoD OSR in the review of material related to their areas of responsibility.

ENCLOSURE 4

RESPONDING TO CONGRESSIONAL REQUESTS, INQUIRIES, AND INVESTIGATIONS

1. RESPONSES

a. Replies to all congressional inquiries and requests shall be as responsive and expeditious as possible pursuant to DoD 5110.4-M (Reference (1)).

b. If a response to a request will be unduly delayed, an interim reply shall be made and shall indicate the anticipated date of completion and the steps taken to obtain the information requested; if a firm date of completion is not determinable, a brief explanation of such circumstances should be included in the interim reply.

c. If there is a question as to whether particular information may be furnished to a member or committee of the Congress, the Department of Defense shall attempt to furnish the information in an alternate reply (e.g., a briefing) acceptable to the requester and the Department.

d. The ASD(LA) shall be informed of any such circumstance in which an alternate method of furnishing information to Congress becomes necessary.

e. In the event that an alternate reply is not acceptable, there shall be no final refusal to furnish such information to a member of Congress, except with the express approval of the Head of the DoD Component concerned or the Secretary of Defense.

f. A final refusal to a committee of the Congress may be made only with the concurrence of the ASD(LA), in consultation with the Secretary of Defense, who shall be responsible for ensuring compliance with all procedural requirements imposed by the President or pursuant to his or her direction.

g. Information requested by members of Congress for their constituents shall be tested for limitations on dissemination according to Enclosure 3, paragraph 6, of this Instruction and handled in the same manner as if the constituent had written directly to the Department of Defense. If information cannot be released, the member requesting the information shall be advised promptly of that fact and of the reasons for the determination.

h. Congressional requests or subpoenas for documents and interviews of current and former DoD personnel, including Service members, will be coordinated with the OLC.

2. WRITTEN REQUESTS ADDRESSED TO THE SECRETARY OF DEFENSE OR DEPUTY SECRETARY OF DEFENSE

a. Complete replies to congressional correspondence addressed to the Secretary of Defense or Deputy Secretary of Defense shall be provided no later than the suspense date as assigned by the Executive Services Directorate, Washington Headquarters Services (ESD,WHS).

b. If the information requested is not readily accessible or is of such volume or complexity that prohibits a complete reply by the suspense date, the requester shall be advised, through an immediate interim reply, of when the information will be supplied.

c. Request for extensions or transfers pursuant to Reference (l) shall be submitted to ESD, WHS.

3. CONGRESSIONAL INVESTIGATIONS

a. The ASD(LA) oversees compliance governing legislative investigations of DoD activities, including liaising with the Congress to coordinate DoD response and keeping appropriate DoD personnel informed of the status of such investigations (except for those affecting budgets and appropriations, and those related to financial matters).

b. DoD Components shall furnish information copies of all direct written communications to and from the Congress, with respect to such investigations, to the ASD(LA).

4. PUBLIC RELEASES. Replies to congressional inquiries or requests or other transmittals that may result in the release of information with significant public affairs implication will be coordinated in advance with the ASD(PA) pursuant to DoD Directive 5122.05 (Reference (m)).

ENCLOSURE 5

PROCESSING CONGRESSIONAL TRANSCRIPTS

1. EDITING TRANSCRIPTS. Following testimony by DoD witnesses before a congressional committee in executive session, the committee provides the ASD(LA) with a stenographic transcript of the testimony, and, in the case of the Appropriations Committees, transcripts are provided to USD(C)/CFO to permit:

a. Incorporation of necessary editorial corrections. Usually, editing by witnesses will involve changes of language or punctuation designed to correct grammatical errors or obvious mistakes in facts or numbers.

b. Deletion of security information if open publication is contemplated. Material to be deleted for editorial reasons will be lined out rather than bracketed. (Brackets are reserved for security deletions in accordance with paragraph 3.a. of this enclosure.)

2. COORDINATION AND MONITORING OF TRANSCRIPTS

a. ASD(LA) or USD(C)/CFO shall complete and attach DD Form 1587, "Record of Congressional Transcript Review," to the transcript, determine suspense dates, and forward the transcript to the parent office of the witness(es) for preliminary review.

b. ASD(LA) or USD(C)/CFO will forward transcripts to the appropriate DoD Component. To accomplish expeditious handling of transcripts, strict time limits are imposed for return of the transcripts.

c. ASD(LA) or USD(C)/CFO, during the review process, will monitor the status of all transcripts in which one or more DoD witnesses appear before a congressional committee, as well as when an OSD representative appears with a witness from a Military Department.

3. SECURITY REVIEW OF TRANSCRIPTS

a. Information that warrants the protection of a security classification under the provisions of Reference (h) will be marked for deletion with brackets [].

b. Security deletions must be as specific as possible; for example, classified numbers will be deleted rather than the sentence or paragraph in which they appear.

c. If an entire passage requires deletion, the brackets will clearly indicate the extent of the deletion. Information marked for deletion from executive session transcripts must reflect a consistent and defensible security position.

- d. Bridging of deletions with substitute unclassified language is not necessary.

4. FINAL REVIEW AND CLEARANCE OF TRANSCRIPTS

a. Immediately upon completion of editing and preliminary security review, the monitoring office will ensure that the transcript (with the related DD Form 1587) is forwarded to the ASD(LA) or USD(C)/CFO, as appropriate, for transmittal to the DoD OSR for final review and clearance.

b. The DoD OSR shall make final security determinations, using red markings, and return the transcript to ASD(LA) or USD(C)/CFO, as appropriate, for processing in accordance with the individual requirements of the committee concerned, including any required excision of classified material. Some committees furnish two copies of a transcript, both of which must be returned: a copy for open publication excised of all classified material and a committee file copy with the classified areas indicated by red brackets. Completed transcripts will be returned to committees by ASD(LA) or USD(C)/CFO, as appropriate.

ENCLOSURE 6

PROCESSING IFRs AND QFRs

1. ASSIGNMENT OF IFRs AND QFRs

a. ASD(LA) and USD(C)/CFO receive IFRs and QFRs from congressional committees and assign them to DoD Components as appropriate.

b. Assignments of IFRs and QFRs directed to the Secretary of Defense and Deputy Secretary of Defense will be made by the ASD(LA) or the USD(C)/CFO, as appropriate.

c. Assignments of all other IFRs and QFRs will be made according to the directions of congressional members in the transcript record of the respective hearing, or in the QFR transmissions from congressional committees to the Department of Defense.

d. Electronic files of individual IFRs and QFRs will be posted on the Congressional Hearings and Reporting Requirements Tracking System (CHARRTS) Web site.

(1) NO CLASSIFIED MATERIAL may be posted on (or uploaded to) CHARRTS.

(2) All classified material transmissions must be made via secure communication.

e. ASD(LA) or USD(C)/CFO, as appropriate, will notify DoD Components of each new assignment of IFRs and QFRs.

f. DoD Components will monitor and download assigned IFRs and QFRs on CHARRTS.

2. SECURITY REVIEW OF IFRs AND QFRs

a. All answers to IFRs and QFRs will receive a security and policy review by the DoD OSR to ensure that there is no classified information, and to ensure consistency with DoD policy in accordance with References (h) and (i).

b. IFRs and QFRs shall not be forwarded to a congressional committee without review by the DoD OSR.

(1) Where required, DoD OSR will notify the submitting DoD Component of information that must be excised from IFRs and QFRs for security reasons.

(2) Upon completion of the review, DoD OSR will transmit cleared IFRs and QFRs to ASD(LA) or USD(C)/CFO, as appropriate.

3. TRANSMISSION TO CONGRESS. ASD(LA) or USD(C)/CFO, as appropriate, will transmit all properly processed and cleared IFRs and QFRs to the respective congressional committee as appropriate.

4. RESTRICTION OF PUBLIC RELEASE. Information presented in hearings shall not be released to the public until released by the congressional committee or with permission of the committee. The importance of maintaining the confidence of the Congress in this regard cannot be overemphasized.